In the Supreme Court of the United States

October Term, 1953

No. 709

STEWART-JORDAN DISTRIBUTING COMPANY, INC.
Petitioner

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 109-116) are unreported. The opinion of the Court of Appeals (R. 131-147), with the dissenting opinion, is reported at 210 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals (R. 148) was entered on January 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether employees of a wholesale beer distributor, engaged in collecting and transporting to their employer's warehouse beer bottles and cases destined to specific out-of-state breweries, and specifically so marked for the out-of-state destination, are "engaged in commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U. S. C. (Supp. V), 201 *et seq.* are:

SEC. 3. As used in this Act—

* * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than 75 cents an hour.

* * *

SEC. 11. * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner (and other defendants who did not appeal from the District Court judgment) from violating the minimum wage and record keeping provisions of the Fair Labor Standards Act of 1938 (Sections 6 and 11(c)) in the employment of truck driver helpers or "strikers."[1]

Petitioner is engaged at Jacksonville, Florida, in the wholesale distribution of beer, ale, and wine (Fdg. 1, R. 109-110), all of which is obtained from

---

[1] The other defendants consisted of the driver-salesman employed by petitioner and claimed by it to be the sole employers of the employees involved in violations of the Act. The two lower courts held against petitioner on this issue (R. 114, 137-138), and petitioner now "accepts the findings and conclusions * * * that the helpers are its employees" (Petition for Certiorari, p. 6).

sources outside the State of Florida (Fdg. 2, R. 110). The "strikers" in question work with the truck driver-salesmen who are employed by petitioner to make sales and deliveries to regular customers along regular routes, and to pick up and return to petitioner's warehouse all beer bottles and cases of the re-usable type (Fdg. 4, 5, 8, R. 110-111).

Beer and ale is shipped into Jacksonville by rail in carload lots, petitioner receiving approximately 22 carloads per month (Fdg. 3, R. 110). About one-fourth of the total beer and ale handled by petitioner comes in bottles and cases of the re-usable type (*id.*). These re-usable containers are purchased by petitioner from the out-of-state breweries at three cents a bottle plus 12 cents for the case (apart from the price of the contents) (R. 18), pursuant to a "set agreement with them that they will buy back all the empties we care to send back to them" (R. 94). Only two breweries are involved, Pabst Blue Ribbon of Peoria, Illinois, and Burger of Cincinnati, Ohio (Fdg. 2, R. 110). Practically all of the returns are to the Pabst company which uses brown beer bottles and cases marked with its Blue Ribbon name.

Though petitioner is under no compulsion to return the reusable bottles and cases to the out-of-state breweries, its vice-president and general manager testified that it gathers them "for the pur-

pose of sending them back" (R. 94). The return shipments are made by rail and in carload lots (about 2,000 cases to a car) at the rate of approximately one carload a week (Fdg. 7, R. 111). The dollar value of these shipments is approximately $6,720.00 a month (R. 95).

The "strikers" ride on the delivery trucks with the driver-salesmen. Their duties include unloading the required number of cases of beer and ale at each customer's place of business and also loading onto the truck the empty containers which have accumulated there. Before picking up the "empties" they first carefully check each case which is marked with the name of the out-of-state brewery to ascertain that it is full and contains only bottles of the returnable type. (Fdg. 5, R. 111; Majority Opinion, R. 132-133.) Upon returning to the warehouse they unload these cases of "empties" from the trucks and stack them against the warehouse wall at a place designated by the warehouse foreman (Fdg. 5, R. 111; Majority Opin., R. 133). The "strikers" and driver-salesmen pick up and return to the warehouse approximately 2,000 cases of empty bottles each week (Fdg. 7, R. 111). Subsequently all of these returnable bottles are moved to the back of the warehouse by warehouse employees where they are again checked to remove any remaining broken or unsuitable bottles (Fdg. 6, R. 111). As stated above, approximately

once a week the "empties" are loaded into a railroad car and shipped back to the out-of-state breweries.

During the period in controversy the "strikers" worked at least 10 hours a day and were paid a daily rate of $5.00 which was later raised to $6.00 (Fdg. 16, R. 114). Since October 7, 1950, petitioner has failed to make, keep and preserve any records of the names, addresses, dates of birth, hours of work or rates of pay with respect to the "strikers" (Fdg. 17, R. 114).

Both courts below held that the Act was applicable and that petitioner should be enjoined from further violations. The district court held that "in picking up, loading on delivery trucks, returning to the warehouse empty beer containers which are intended for and which are subsequently shipped to breweries located outside the state of Florida," the strikers "are engaged in interstate commerce within the meaning of the Fair Labor Standards Act" (R. 115). This holding was affirmed by the court of appeals, in a two-to-one decision, on the authority of *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564.

ARGUMENT

The decision of the court of appeals correctly applies the principles of this Court's decision in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. It is not in conflict with the decision of any other United States court of appeals, and further review of it is unnecessary.

1. In the *Jacksonville Paper* case, goods destined to a specific out-of-state customer were held to be continuously "in commerce" within the meaning of the Fair Labor Standards Act, despite a temporary stop at a warehouse where they were unloaded and reloaded for "subsequent movement * * * to their intended destination." 317 U.S. at 567. "[I]f the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." *Id.* at 568. This was held to be the case with respect to goods brought to the warehouse "pursuant to a preexisting contract or understanding" for an intended destination to a customer beyond the warehouse. *Id.* at 568-569.

It is indisputable in the instant case that when the cases of bottles are picked up and transported by petitioner's drivers and helpers, their intended destination is beyond the warehouse to the out-of-state brewery "pursuant to a preexisting contract or understanding" with that brewery. It is also indisputable that the halt at the warehouse, which admittedly serves "as the central point for assembly and preparation for the shipment outside the state" (Petition for Certiorari, p. 10), is merely "a convenient intermediate step" in the process of getting the bottles to their final destination. There is thus "a practical continuity of move-

ment" of the bottles from the moment they are picked up by the drivers and helpers, on through the warehouse, and until they reach their final destination.

While the *Jacksonville Paper* case dealt with the end of the movement, whereas the instant case is concerned with the beginning, the same principles are equally applicable where there is the requisite integration and "practical continuity of movement." *United States* v. *Capital Transit Co.*, 325 U.S. 357, rehearing denied, 325 U.S. 896, reaffirmed in 338 U.S. 286; *Airlines Transp.* v. *Tobin*, 198 F. 2d 249 (C.A. 4); *Rockton & Rion Railroad* v. *Walling*, 146 F. 2d 111 (C.A. 4), certiorari denied, 324 U.S. 880; *Republic Pictures Corporation* v. *Kapler*, 151 F. 2d 543 (C.A. 8), affirmed, 327 U.S. 757, rehearing denied, 327 U.S. 817.

2. The *Jacksonville Paper* decision also disposes of petitioner's contention that the Act does not apply to the "strikers" because the work of gathering "empties" and transporting them to the warehouse is performed in connection with petitioner's "local business" of "local distribution." (Pet. 13-14.) The branch warehouses involved in *Jacksonville Paper* were also engaged in "local distribution," and the "bulk of the merchandise" which passed through them was found to be no "different from goods acquired and held by a local merchant for local disposition." 317 U.S. at 566, 570. But this Court specifically held that: "The fact that all of respondent's business is not shown

to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling, supra* [316 U.S. 517], p. 524. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act." *Id.* at 571-572.

Plainly the duties of the employees here involved with reference to the cases of empty beer bottles were "substantial." They regularly and daily picked them up, transported them and unloaded them from their trucks and stacked them against the warehouse (Fdg. 5, R. 111).

3. Petitioner's assertion that the lower court's decision is in conflict with *Coe* v. *Errol,* 116 U.S. 517, and other cases based on it, is without merit. (Pet. 8-11.) None of those cases arose under the Fair Labor Standards Act. Most of them deal with the power of a state to tax goods in the initial stages of preparation or transportation toward a possible interstate destination, and "decisions such as those * * * are not particularly helpful in determining the scope of the Act. *Kirschbaum Co.* v. *Walling, supra,* pp. 520-21; *Walling* v. *Jacksonville Paper Co., supra.*" *Overstreet* v. *North Shore Corp.,* 318 U.S. 125, 132.

The two Federal Employers' Liability Act cases and the one Merchant Marine Act case cited by petitioner are also inapplicable. (Pet. 10.) All

three are based on *Coe* v. *Errol, supra.* Moreover, as to the Employers' Liability Act cases, this Court's decision in *McLeod* v. *Threlkeld,* 319 U.S. 491, cautions against applying them uncritically to Fair Labor Standards Act problems. "The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act." 319 U.S. at 495.

CONCLUSION

The decision below is correct and there is no conflict. Nor does the question as presented on the record in this case appear to be of sufficient substance or general importance to warrant review by this Court. Accordingly we oppose the issuance of the writ.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Chief of Appellate Litigation,

SYLVIA S. ELLISON,
Attorney,

UNITED STATES DEPARTMENT OF LABOR.

May 1954.

[illegible] U. S. GOVERNMENT PRINTING OFFICE 1954—[illegible] O. 1954

15

Office - Supreme Court, U.
FILED
MAY 28 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 709

STEWART-JORDAN DISTRIBUTING COMPANY, INC.,

Petitioner,

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

MARSHALL A. PIPIN,
135 S. La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

SEAGO, PIPIN, BRADLEY & VETTER,
Chicago, Illinois,
Of Counsel.

THE CHURCHILL-HARRIS PRINTING COMPANY, CHICAGO